



Legal Alert: DOL Proposes Revising FMLA Regulations

1/31/2012

Executive Summary: The Department of Labor has announced that it will publish a Notice of Proposed Rulemaking (NPR) proposing regulations implementing the changes to the Family and Medical Leave Act (FMLA) made by the 2010 National Defense Authorization Act (NDAA) and the 2009 Airline Flight Crew Technical Corrections Act (AFCTC). The DOL also proposes deleting optional use forms from the Appendix to Section 825 and making them available only on the DOL's web site to eliminate confusion that may arise if the forms on the web site differ from those included in the Appendix.

Military Leave Amendments

The 2010 NDAA, among other things, amended the FMLA to expand the scope of the provisions of the FMLA pertaining to leave for qualifying exigencies and military caregiver leave. Specifically, the NDAA now permits family members of active duty service members to take leave for a qualifying exigency. Previously, only family members of National Guard and Reservists called to active duty in support of a contingency operation were permitted to take leave for a qualifying exigency. The NDAA also extends the scope of military caregiver leave to families of certain veterans, who previously were not covered by the provision. It also permits military caregiver leave for serious injuries or illnesses that are the result of pre-existing conditions that were aggravated by service while on active duty. For a discussion of the 2010 NDAA's amendment of the FMLA, please see our November 3, 2009 Legal Alert, *FMLA's Military Leave Provisions Expanded*, available at: <http://www.fordharrison.com/shownews.aspx?show=5448>.

According to the DOL's fact sheet on the NPRM, the key provisions of the proposed amendments include:

- the extension of military caregiver leave to eligible family members of recent veterans with a serious injury or illness incurred in the line of duty;
- a flexible, three-part definition for serious injury or illness of a veteran;
- the extension of military caregiver leave to cover serious injuries or illnesses for both current servicemembers and veterans that result from the aggravation during military service of a preexisting condition;
- the extension of qualifying exigency leave to eligible employees with covered family members serving in the Regular Armed Forces; and

- inclusion of a foreign deployment requirement for qualifying exigency leave for the deployment of all servicemembers (National Guard, Reserves, Regular Armed Forces).

The DOL also proposes to allow the amount of leave an employee may take for Rest and Recuperation qualifying exigency leave to equal that provided to the military member, up to a maximum of 15 days, which is an increase from the 5 days currently permitted.

Flight Crew Amendments

The AFCTCA expanded the coverage of the FMLA with respect to flight attendants and pilots. According to the bill's sponsors, the AFCTCA was designed to address the unique concerns of flight crew workers who, because of the way their duty hours are calculated, may not meet the FMLA's eligibility requirement of working 1,250 hours a year. The original 1,250 hour requirement was intended to represent 60% of a typical full-time schedule (2,080 hours) over the course of a year.

Because of the way that duty hours are computed for pilots and flight attendants, many could not meet the 1,250-hour requirement. The AFCTCA addresses this issue by providing that pilots and flight attendants will be considered to meet the FMLA's hours of service requirement if they have worked or been paid for not less than 60% of the applicable monthly guarantee for the previous 12-month period and have worked or been paid for not less than 504 hours during the previous 12-month period. The DOL proposes expanding the eligibility standards set forth in 29 C.F.R. § 825.110 to reflect the AFCTCA's expanded definition of the "hours of service" requirement for airline flight crew employees. The DOL also proposes the addition of specific provisions for calculating the amount of FMLA leave used by both lineholder and reserve pilots and flight attendants.

The DOL takes the position that the requirements of the AFCTCA were effective on the enactment date of the statute. The new regulatory requirements, however, will not be effective until the DOL issues a final rule.

Employers' Bottom Line

The NPRM has not yet been published in the Federal Register. Comments will be due sixty days from the date of publication in the Federal Register. A copy of the NPRM is available at:
http://www.dol.gov/whd/fmla/NPRM/FMLA_NPRM_2012.pdf.

If you have any questions about the NPRM or the FMLA in general please contact the Ford & Harrison attorney with whom you usually work or Tim Bland, tbland@fordharrison.com, who is a partner in our Memphis office. If you have any questions about the airline flight crew regulatory provisions in particular, please contact Sarah Wimberly, swimberly@fordharrison.com, who is a partner in our Airline Group and has extensive experience with FMLA issues within the airline industry.